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Nos. 23 to 28

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

HIRAM KIMBALL CLEVELAND, PETITIONER

v.

THE UNITED STATES OF AMERICA

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HIRAM KIMBALL CLEVELAND, PETITIONER

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DAVID BRIGHAM HARDER, PETITIONER

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VERNEL V. JESSUP, PETITIONER

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FOLLIS GARDNER PETTY, PETITIONER

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WILLIAM CHATWIN, PETITIONER

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CHARLES F. ZITTING, PETITIONER

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EDNA CHRISTENSEN, PETITIONER

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*WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

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No. 24

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No. 25

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No. 26

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No. 31

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CHARLES F. ZITTING, PETITIONER

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No. 33

EDNA CHRISTENSEN, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

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*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

# BRIEF FOR THE UNITED STATES

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## OPINIONS BELOW

The opinion of the circuit court of appeals (R. 116–123) is reported at 146 F. 2d 730. The opinion of the district court (R. 13–25) is reported at 56 F. Supp. 890.

## JURISDICTION

The judgments of the circuit court of appeals were entered January 4, 1945 (R. 123–128). The petition for writs of certiorari was filed January 30, 1945, and the writs were granted March 12, 1945 (R. 129–134). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. (a) Whether a professed religious belief in polygamy absolves petitioners from prosecution under the Mann Act.

(b) Whether the dominant purpose of the transportations involved was sexual relations within the purview of the Mann Act and the decision of this Court in *Mortensen* v. *United States*, 322 U. S. 369.

2. Whether the facts in Cases Nos. 31–33 establish a violation of the Federal Kidnaping Act.

STATUTES INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> SEC. 2. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction

thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

The Federal Kidnaping Act of June 22, 1932, c. 271, 47 Stat. 327, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides in pertinent part as follows:

SEC. 1. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: * * *

## STATEMENT

Seven indictments charging violations of the Mann Act, and one charging a violation of the

Federal Kidnaping Act were returned against petitioners in the United States District Court for the District of Utah (R. 1, 40–41, 46–48, 54–55, 70, 78–79, 94–95, 106–107). Petitioners are all members of the Fundamentalist cult, which sanctions plural, or as they call it, "celestial" marriage (R. 7, 11, 56, 72, 81, 82, 98–99, 109).[1] Each of them waived the right to a jury and consented to the trial of his case by the court on a stipulation of facts entered into by his counsel (R. 7, 11–12, 41, 48, 55–56, 71, 80, 96–97, 107–108).

THE MANN ACT CASES (NOS. 23–30)

Each of the Mann Act indictments charges the petitioner named therein with having transported a woman in interstate commerce for the immoral purpose of having her act as a mistress or concubine, and all, except the indictments in cases Nos. 26 and 30, also charge that the transportation was for the purpose of debauchery (R. 1, 40–41, 46–48, 54–55, 70, 94–95, 106–107). The first two indictments against petitioner Cleveland also

[1] In the stipulations of fact a "celestial" marriage is defined as a "religious ceremony according to the beliefs" of the Fundamentalists, but contrary to State law. (See R. 7, 56). It is thus used in the sense of a plural or illegal marriage. The term should not be confused with the doctrine of the Mormon Church that a marriage performed by a member of the priesthood of that church is "for time and eternity," i. e., to last beyond death. See *Hilton* v. *Roylance*, 25 Utah 129, 145–149 (1902); *Toncray* v. *Budge*, 14 Idaho 621, 647–656 (1908). Since 1890 the Mormon Church has forbidden plural marriages. *Toncray* v. *Budge*, *supra*.

specify that the transportation was for the immoral purpose of having sexual intercourse with a woman not the wife of the petitioner (R. 1, 40–41). The stipulated facts in each such case may be summarized as follows:

*Nos. 23–25.*—In 1941 petitioner Cleveland was legally married to Zola Chatwin and was cohabiting with Marie Beth Barlow with whom he had entered into a plural cult marriage when she was fourteen years of age. Marie Barlow was taken into custody by Utah juvenile authorities after the birth of a child she bore petitioner in December 1941. She was released upon condition that she have no further connection with petitioner. In order to evade the ruling of the court, petitioner secreted her for a time in a tourist camp at Salt Lake City. (R. 7–8.)

In August of 1941, while visiting a friend at a hospital, petitioner became acquainted with Kathryn Collinwood, twenty-one years old, in training as a nurse. In the next two days, during which petitioner spent considerable time with Miss Collinwood, he discussed plural marriage with her. On the second day after their meeting they went through the form of a plural cult marriage, and thereafter engaged in sexual intercourse. Petitioner had promised Miss Collinwood a "honeymoon" trip, and several months after the cult ceremony had been performed they went from Utah to Evanston, Wyoming, where

petitioner had engaged a room in a hotel. They engaged in sexual relations during the day and night. The next day they returned to Salt Lake City. (R. 8–9.) This trip forms the basis of the indictment in No. 23 (R. 1).

In early 1942, Miss Collinwood arranged a "date" for petitioner with one Marcia Covington, seventeen years of age. One evening in April, after petitioner and Miss Covington had spent some time drinking wine, she consented to enter into a plural marriage with petitioner. They went to Saint George, Utah, to have a cult marraige performed, but could not locate the member of the cult who was to perform the ceremony. They agreed to go to California and have the ceremony performed there. They entered into a cult marriage in California and spent the night in an automobile tourist cabin where they engaged in sexual intercourse. The next day Miss Covington refused to go further with the plural marriage. (R. 9.) The transportation of Miss Covington from Utah to California is the basis of the indictment in No. 24 (R. 40–41).

In June 1942 the leaders of the cult decided that Kathryn Collinwood should be taken out of Utah because she was being investigated by the authorities for practicing obstetrics without a license. Petitioner and Miss Collinwood went to Grand Junction, Colorado, where petitioner obtained employment. In August petitioner told her

that he was going to Salt Lake City to bring back Marie Barlow "so that she might become pregnant." He transported Marie Barlow from Salt Lake City to Colorado and there engaged in sexual intercourse with her. Miss Barlow remained in Grand Junction for a time and petitioner alternately cohabited with her and with Miss Collinwood. Sometime later Marie Barlow returned to Salt Lake City. She did not become pregnant, and in October, petitioner again brought her from Salt Lake City to Grand Junction for the express purpose of having her become pregnant. He cohabited with her in Grand Junction for several months. Kathryn Collinwood had in the meantime returned to Salt Lake City. Petitioner sent her money to enable her to return to Colorado by train. She did so, and thereafter resumed sexual relations with petitioner. At Grand Junction petitioner would alternate living with his plural wives, introducing them as sisters-in-law, or other relatives. (R. 10–11.) The three counts of the indictment in No. 25 are based on the two transportations of Marie Barlow and the return of Kathryn Collinwood from Salt Lake City, Utah, to Grand Junction, Colorado (R. 46–48).

In April 1943, petitioner's legal wife divorced him in order to enable him to marry Marie Barlow, but petitioner's former wife continued to live with him in plural marriage. Petitioner married Miss Barlow in Evanston, Wyoming, a few days

after his divorce. Five months later she gave birth to her second child by petitioner, she being at that time approximately sixteen years old. (R. 7, 8.)

*No. 26.*—Petitioner Darger had one legal and two plural wives. He was living with one of his plural wives, Jean Barlow, in Grand Junction, Colorado, where he had been working as a contractor. In July 1942, he transported her from Colorado to Salt Lake City, Utah, where he lived with her and his other wives in a state of plural marriage. Thereafter Darger returned to Colorado for a short period and then came back to Salt Lake City where he continued to live with Miss Barlow and his other wives. (R. 56–57.)

*No. 27.*—Petitioner Jessop and his legal wife employed Mae Johnson, then fifteen years old, as a housemaid. Jessop courted Mae Johnson openly before his wife and nine children, causing some domestic difficulties. He persuaded her to enter into a plural marriage with him in 1941, and later established a home for her in Short Creek, Utah, two miles away from his home in Short Creek, Arizona. In April 1943, she had a child by petitioner. In July 1943, when his legal wife temporarily left their home, petitioner, who remained at home with his children, immediately transported Mae Johnson from Short Creek, Utah, to Short Creek, Arizona, and there cohabited with her for about a week. His children witnessed petitioner in bed with Mae Johnson. (R. 72–73.)

*Nos. 28–29.*—Petitioner Dockstader maintained two households, one with his legal wife in Short Creek, Arizona, and one with his plural wife in Salt Lake City, Utah. In July 1943, Dockstader arranged to have petitioner Stubbs move his plural wife and her furniture from Utah to his home in Arizona where he was to live in plural marriage with the two women. At the time Stubbs moved the plural wife he knew that the purpose of the transportation was to enable Dockstader to live in plural marriage with both women. (R. 97–98.)

*No. 30.*—In 1934, petitioner Petty, living with his legal wife in Pocatello, Idaho, became acquainted with Mary Ford, a crippled woman. He paid considerable attention to her, and petitioner's legal wife proposed plural marriage to her on petitioner's behalf. After a period of argument and discussion, Miss Ford entered into a plural cult marriage with petitioner. For a time she remained at home with her mother, but regularly engaged in sexual intercourse with petitioner in the absence of his legal wife at his apartment and in a small building at the rear of the apartment which was used for the storing of furniture. She had three children by him, one of whom died. Early in 1943 petitioner established a home for Miss Ford in Providence, Utah, and commuted between that place and the home he maintained with his legal wife in Pocatello, Idaho, living with the two women alternately. In July,

1943, he consented to have Miss Ford visit relatives in Idaho. After her visit she went to her mother's home in Pocatello, Idaho, and, through her mother, communicated with petitioner. Petitioner transported her from Pocatello to her living quarters in Providence, Utah. Upon his arrival, he proposed sexual relations to her, but she refused. A few weeks later petitioner came back to Providence and forcibly attempted to have sexual relations with Miss Ford, and desisting from the struggle that ensued only when he heard someone on the front porch of their house. Petitioner then informed Miss Ford that if that was her attitude he had no obligation further to support the children. Thereafter he gave Miss Ford only five dollars and she was forced to rely solely on public relief for her sustenance. (R. 108–110.)

THE KIDNAPING ACT CASES (NOS. 31–33)

The Kidnaping Act indictment charges that petitioners Chatwin, Zitting, and Christensen unlawfully inveigled, decoyed, carried away, and held a minor child, age fifteen, for a certain period and, knowing her to have been so inveigled and held, transported her from Utah, by way of El Paso, Texas, to Short Creek, Arizona (R. 78–79).

The stipulated facts are that in August 1940, Chatwin, a widower, then sixty-eight years of age and living with one Lulu Cook, employed as a

housekeeper in his home in Santaquin, Utah, Dorothy Wyler, a girl fourteen years old, with the mentality of a seven year old child. While living in Chatwin's home she was continually taught by Chatwin and Lulu Cook that plural marriage was essential to her salvation, and that it was her grandmother's desire that Chatwin should take her in plural marriage. She was persuaded to enter into a cult marriage with Chatwin, and she subsequently became pregnant. When her parents discovered her condition, they informed the juvenile authorities of the State of Utah, who took her into custody on August 4, 1941, and caused her to be made a ward of the juvenile court. On August 10, 1941, the girl eluded the authorities and was given money by two daughters of Chatwin to go to Salt Lake City. There she went to the home of Darger, one of the petitioners in the Mann Act cases. From there she was taken to the home of petitioners Zitting and Christensen. They, together with Chatwin, convinced her that, as they put it, she should "abide by the law of God rather than the law of man," and that she was perfectly justified in running away from the juvenile court in order to live with Chatwin. They further convinced her that she should go to Mexico to be married to Chatwin, and then remain in hiding until she reached her majority under Utah law. In October, the three petitioners transported the girl to Mexico, by way of El Paso, Texas. She

went through a civil marriage ceremony with Chatwin in Mexico, giving her age as eighteen years, and was subsequently brought back to Short Creek, Arizona, where she remained in hiding and where she lived with Chatwin under assumed names, until discovered by federal authorities two years later. (R. 80–84.) While in Short Creek she gave birth to two children by Chatwin. The transportation of the girl was without the consent and against the wishes of her parents and without authority from the Utah Juvenile Court.[2]

All the petitioners were found guilty as charged (R. 25, 42, 49, 65, 74, 85, 99–100, 111). Petitioner Cleveland was sentenced to imprisonment for three years on each of the first two indictments returned against him, the sentences to run concurrently, and to imprisonment for one year and one day on each of the three counts of the third indictment, the sentences on this indictment to run concurrently with each other, but consecutively to the sentences imposed on the other indictments (R. 26–27, 43, 50–51). The other petitioners named in the Mann Act indictments were each sentenced to imprisonment for three years (R. 66, 75, 101–102, 112–113). On the kidnaping charge, Chatwin and Zitting were each sen-

[2] See *Chatwin* v. *Terry*, 153 P. 2d 941 (Utah, 1944), in which the Utah Supreme Court held that the juvenile court had authority to hold the girl in custody until she reached the age of twenty-one, despite her marriage to Chatwin.

tenced to imprisonment for two years, and Christensen to imprisonment for one year and one day (R. 86–88). On appeal, the judgments as to all the petitioners were affirmed (R. 123–128).

## SUMMARY OF ARGUMENT

1. *The Mann Act Cases.*—In *Caminetti* v. *United States,* 242 U. S. 470, this Court decided that transportation of a woman for the purpose of having her act as a mistress or concubine is transportation for an immoral purpose within the meaning of the Mann Act. Since the women transported fell within that status, petitioners' professed religious belief in polygamy does not absolve them from criminal liability. *Reynolds* v. *United States,* 98 U. S. 145, 167. The decision of this Court in *Mortensen* v. *United States,* 322 U. S. 369, is inapplicable, for, in each instance, the purpose to establish or continue sexual relations was the dominant cause for the transportation of the woman named in the indictment.

2. *The Kidnaping Act Cases.*—Petitioners' act in persuading a young child of extremely low mentality to avoid the lawful custody of the Utah Juvenile Court and of her parents, and to remain with petitioners in order to cohabit with one of them, was an inveiglement and a holding "for ransom, reward, or otherwise," within the meaning of the Federal Kidnaping Act. The moment the child was transported across state lines the federal offense was completed.

## ARGUMENT

### I

### THE EVIDENCE ESTABLISHES VIOLATIONS OF THE MANN ACT AS THAT STATUTE HAS BEEN CONSTRUED BY THIS COURT

a. *The scope of the statute.*—Almost thirty years ago, in *Caminetti* v. *United States,* 242 U. S. 470, this Court decided that the interstate transportation of a woman for the purpose of living with her as a mistress or concubine is transportation for an immoral purpose within the meaning of the Mann Act; that pecuniary gain, either as a motive for the transportation or an attendant of its object, is not an element of the offense defined. The arguments for and against such an interpretation of the statute are marshalled in the majority and dissenting opinions in that case, and no purpose would be served by repeating them here.[3] The significant fact, we think, is

[3] It may be noted that the majority opinion in the *Caminetti* case understated the facts when it said that the former decision in *United States* v. *Bitty,* 208 U. S. 393, "must be presumed to have been known to Congress" when it enacted the Mann Act (242 U. S. at pp. 487–488). The holding of the *Bitty* case—that the phrase "any other immoral purpose," as used in the Act of February 20, 1907, penalizing the importation of any alien woman for the purpose of prostitution and any other immoral purpose, includes a purpose to have the woman live as a concubine—was specifically mentioned in both the Senate and House Reports on the Mann Act (61st Cong., 2d sess., S. Rep. 886, p. 4; H. Rep. 47, p. 7). The statement in the reports that "this

that, in the more than a quarter of a century that has elapsed since that decision, it has been accorded unquestioned acceptance by Congress.

The only congressional attention given to the *Caminetti* case was in its initial stage, when an order from the then Attorney General to postpone the trial of the defendants for several months results in vigorous protests on the part of certain members of Congress (see 50 Cong. Rec. 2532, 2874–2900, 3006–3023), with Representative Mann, the author of the Act, among the leaders of the group seeking to condemn the Attorney General (50 Cong. Rec. 2875, 2879–2880, 2884, 3006). We have found only two bills introduced which were designed to circumscribe the effect of that decision, and both such bills died in committee (see S. 2438, 73d Cong., 2d sess., introduced January 1934, and S. 101, 75th Cong., 1st sess., introduced January 1937).[5]

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decision is not pertinent to the phase of the subject under discussion, and is mentioned only in passing" does not detract from the force of the *Bitty* case as an interpretation of the phrase "other immoral purpose," for that portion of the reports was concerned with the provisions of the former Act punishing the harboring of alien prostitutes, and the reports explained the manner in which Section 6 of the Mann Act avoided the constitutional infirmities of the earlier section.

[5] S. 2438 is representative. It sought to add a section providing that "Sections 2 and 3 of this Act shall not be construed to apply to any act prohibited by such Sections, if such act is done with the consent of the woman or girl, and without gain, pecuniary or otherwise, to such woman or girl or other person doing such act."

During the same period, there has been an unbroken line of judicial decisions which have followed the *Caminetti* ruling. It was recognized by implication in the decision of this Court in *Gebardi* v. *United States*, 287 U. S. 112, 120, and has been consistently applied by the various circuit courts of appeals.[5] Recently, in *United States* v. *Reginelli*, 133 F. 2d 595 (C. C. A. 3), this Court was specifically asked to reconsider its decision in the *Caminetti* case, but declined to do so. No. 767, October Term, 1942, certiorari denied, 318 U. S. 783.

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[5] *United States* v. *Reginelli*, 133 F. 2d 595 (C. C. A. 3), certiorari denied, 318 U. S. 783; *Tilghman* v. *United States*, 146 F. 2d 644 (C. C. A. 5); *Qualls* v. *United States*, decided July 5, 1945 (C. C. A. 5); *Elrod* v. *United States*, 266 Fed. 55 (C. C. A. 6); *Blackstock* v. *United States*, 261 Fed. 150 (C. C. A. 8), certiorari denied, 254 U. S. 634; *Carey* v. *United States*, 265 Fed. 515 (C. C. A. 8); *Christian* v. *United States*, 28 F. 2d 114 (C. C. A. 8); *Neff* v. *United States*, 105 F. 2d 688 (C. C. A. 8); *Poindexter* v. *United States*, 139 F. 2d 158 (C. C. A. 8); *Corbett* v. *United States*, 299 Fed. 27 (C. C. A. 9); *Tobias* v. *United States*, 2 F. 2d 361 (C. C. A. 9), certiorari denied, 267 U. S. 593; *Hart* v. *United States*, 11 F. 2d 499 (C. C. A. 9), certiorari denied, 273 U. S. 694; *Ghadiali* v. *United States*, 17 F. 2d 236 (C. C. A. 9), certiorari denied, 274 U. S. 747; *Rockwell* v. *United States*, 111 F. 2d 452 (C. C. A. 9); *Burgess* v. *United States*, 294 Fed. 1002 (App. D. C.).

Most of these cases, like the *Caminetti* case itself, involved situations in which there was consent on the part of the woman as well as absence of a commercial motive. It is firmly established that lack of consent on the part of the woman transported, whether for the purpose of prostitution or other forms of immorality, is not an element of the offense under Section 2 of the Mann Act. *Gebardi* v. *United States*, 287 U. S. 112, 121; *United States* v. *Holte*, 236 U. S. 140, 145.

Under the circumstances, we think that Congress must be deemed to have acquiesced in the interpretation of the Mann Act laid down by this Court in the *Caminetti* decision, and that, if there is to be a change in the scope of the statute, it should come from the legislature and not from the courts. As this Court stated in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488–489:

> * * * The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute * * * has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.

See also *United States* v. *Elgin J. & E. Ry.*, 298 U. S. 492, 500; *Missouri* v. *Ross*, 299 U. S. 72, 75; *United States* v. *Ryan*, 284 U. S. 167, 175; *Beale* v. *United States*, 71 F. 2d 737, 739 (C. C. A. 8).

b. *The federal power to punish interstate transportation for the purpose of having sexual relations with a plural wife.* Petitioners' contention that, as applied to the facts of these cases, the Mann Act amounts to a federal regu-

lation of the marriage relationship (Br. 2, 10–11, 18–19, 39) is no different from previous attacks on the constitutionality of the Act as interfering with the police powers of the state—an argument which was rejected by this Court in *Hoke* v. *United States*, 227 U. S. 308, 321–323; *Athanasaw* v. *United States*, 227 U. S. 326, 328; *Wilson* v. *United States*, 232 U. S. 563, 567; and *Caminetti* v. *United States*, 242 U. S. 470, 491. The Act is no more a federal regulation of marriage than it is a federal regulation of prostitution or other immorality. Such matters are all within the exclusive province of the states. However, the Federal Government constitutionally may, and by the Mann Act does, bar the use of instrumentalities of interstate commerce as a means of effectuating improper objectives, whether such purpose be commercialized vice or noncommercial sexual immorality.

We discuss below the question whether the particular transportation charged in each indictment was so motivated by a purpose condemned by the Act as to constitute a federal crime. Here, it is sufficient to note that, in general, the stipulated facts in these cases show that petitioners made extensive use of interstate transportation in the course of their activities. Several of the petitioners kept legal wives in one state and plural wives in another, and moved these plural wives from state to state, sometimes for short periods, thus rendering state prosecutions difficult. Their

activities were extended into four states—Arizona, Colorado, Idaho, Utah. It is thus evident that petitioners' conduct was not wholly a local issue, of concern to state authorities alone, but that, in fact as well as in law, it presented a federal problem.

c. *Criminal intent.*—Since the Mann Act prohibits the interstate transportation of a woman for the purpose of having improper sexual relations with her, petitioners' professed religious belief in polygamy does not absolve them from criminal liability under the Act. Petitioners argue (Br. 2, 4–5, 7–18, 31–32, 34–35, 37–39, 41, 53–54) that polygamy is merely illegal and not immoral; that it cannot be immoral because it is based on a religious belief. Manifestly, however, the definition of "immoral purpose," as used in the Act, does not depend upon each individual's own standard of morality, but "upon the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations." *Caminetti* v. *United States*, 242 U. S. 470, 486.* If petitioners' construction of the statute were correct, any defendant in a Mann Act prosecution

* "Immoral purpose," as used in the Mann Act, is limited to sexual immorality (*Athanasaw* v. *United States*, 227 U. S. 326); hence, petitioners' illustrations (Br. 7, 24) of the possible scope of the statute if it should be applied to everything forbidden by state statute, as, for example, transportation for the purpose of illegally obtaining cigarettes, liquor, etc., are inapt.

would be free to defend on the ground that, according to his own concepts of morality, religious or otherwise, his acts were not immoral. The court and jury would then, indeed, be required to determine the religio-philosophical questions which petitioners raise (Br. 7–11) as to whether particular acts are immoral in the sense that they represent deviations from a person's own standard of ethics. Clearly, the words "immoral purpose," as used in the Mann Act, were not intended to have any such amorphous, personalized connotation, but were predicated upon the generally accepted standard of sexual morality of this country.

The purpose to live in a polygamous relationship is an immoral purpose under the laws and mores of this country, as repugnant to our concepts of morality as the acts condemned in the *Caminetti* case. It is not less so when attempted to be justified on religious grounds. *Reynolds* v. *United States,* 98 U. S. 145, 163–166; *Davis* v. *Beason,* 133 U. S. 333, 345; *Mormon Church* v. *United States,* 136 U. S. 1, 48–50. The fact that petitioners called the women they transported "wives" and supported them does not make them wives in the accepted concept of the word. Whatever petitioners may profess to believe, these women were mistresses or concubines in the common understanding of those terms. Transportation of a woman for the purpose of having her live in polygamy is, therefore, transportation of

a woman for the purpose of having her live as a mistress or concubine and, hence, within the coverage of the Mann Act as interpreted by this Court in the *Caminetti* case.

If the desire to have sexual relations was the dominant motive for the transportation (*Mortensen* v. *United States,* 322 U. S. 369), a question we discuss below, it is clear that each of petitioners intended to and did perform the very act which the statute forbids—the transportation of a woman for the purpose of having improper sexual relations with her. They thus necessarily had the intent to violate the Mann Act. As this Court stated in *Reynolds* v. *United States,* 98 U. S. 145, 167: "Every act necessary to constitute the crime was knowingly done, and the crime was therefore knowingly committed." Petitioners are free to believe any doctrine; they are not free to act in a manner contrary to the laws of this country. For, as this Court stated in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304: "the [first] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be." See also *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109–110. This distinction is best illustrated by the decisions of this Court in the *Reynolds* and *Beason* cases, *supra,* in which the Court rejected the contentions of the early Mormons that certain

Utah territorial statutes directed against bigamy and polygamy violated the guarantee of religious freedom. While petitioners cannot be prosecuted for believing in polygamy, they may be prosecuted under state law for practicing polygamy (*State* v. *Barlow,* 153 P. 2d 647 (Utah, 1944), certiorari denied upon the authority of the *Reynolds* and *Beason* cases, April 2, 1945, No. 1037, October Term, 1944), and, under federal law, we submit, for transporting a woman for the immoral purpose of having her live as a mistress or concubine in a polygamous relationship.

d. *Motive of the transportation.*—Relying upon the principle enunciated by this Court in *Mortensen* v. *United States,* 322 U. S. 369, petitioners argue (Br. 20–23, 32–33, 36, 40–41, 42–44, 46, 48) that since, in each of the Mann Act cases except the second indictment against petitioner Cleveland, the evidence establishes that the woman transported was already the plural wife of a petitioner, the transportation was not motivated by the purpose condemned by the Act. However, in each instance, the stipulated facts establish that the transportation was in fact "the use of interstate commerce as a calculated means for effectuating sexual immorality." See 322 U. S. at p. 375.

The second indictment against Cleveland, based upon interstate transportation for the purpose of entering into a plural marriage to be followed by sexual relations, manifestly falls outside the

scope of the *Mortensen* decision. The trip had no other purpose than to furnish the excuse for the sexual immorality which occurred. After petitioner and Miss Covington had spent the night together, she refused to continue the plural marriage relationship (R. 9). Since, however, it is evident that when petitioner transported her to California he intended to make her his plural wife, her subsequent repudiation in no way alters the fact that the transportation was for the immoral purpose of having her act as a mistress and concubine, as well as for the improper purpose of having illicit sexual relations with her. The purpose which motivates the transportation, not the accomplishment of such purpose, is the decisive factor in determining guilt under the Mann Act. *Wilson* v. *United States,* 232 U. S. 563, 570–571. Moreover, inasmuch as the purpose of the transportation was the seduction of Miss Covington from virtue by illicit sexual intercourse, the transportation was for the purpose of debauchery under the act, a purpose charged in the indictment (R. 40). See *Van Pelt* v. *United States,* 240 Fed. 346, 348 (C. C. A. 4); *Johnson* v. *United States,* 215 Fed. 679, 683 (C. C. A. 7).

It is also clear that the interstate transportation of Marie Barlow, on which the first count of the third indictment against Cleveland was based, was motivated solely by the purpose to have sexual intercourse, for petitioner announced that

he was bringing Miss Barlow from Utah to Colorado to have her become pregnant, and he sent her back after she had cohabited with him for a short time. (See p. 9, *supra.*) These facts support the aggregate sentence of petitioner Cleveland, in view of the corresponding concurrent sentences imposed on the other indictment and the other counts of the third indictment returned against him (see p. 14, *supra.*). *Hirabayashi* v. *United States,* 320 U. S. 81, 105.

In Nos. 27–29 (*supra,* pp. 10–11), where a plural wife was moved to a home maintained by petitioners Jessop and Dockstader, respectively, for their legal wives, the trier of fact was clearly entitled to conclude that the dominant motive for the transportation was the purpose to have sexual relations with the plural wife, and that she would not have been moved but for such purpose. It is irrelevant that these two petitioners, having already established a polygamous relationship, might have maintained sexual relations with their plural wives in some other place without the interstate journeys. The significant fact is that, in order to cohabit with the plural wives, petitioners found it necessary or convenient to transport them in interstate commerce. Such interstate transportation was therefore the means of effectuating the immoral purpose. Petitioner Stubbs knowingly aided and abetted Dockstader in such purpose (*supra,* p. 11), and thus is liable as a

principal. (Section 332 of the Criminal Code, 18 U. S. C. 550.)

In No. 26 (*supra*, p. 10), it may be that petitioner Darger returned to Utah from Colorado because he had completed his work in Colorado. His guilt under the Mann Act depends, however, not on his motive in transporting himself, but on his motive in transporting his plural wife. *Elrod* v. *United States*, 266 Fed. 55, 57 (C. C. A. 6); *Cohen* v. *United States*, 120 F. 2d 139 (C. C. A. 5). It is a fair inference from the evidence that he brought his plural wife back with him in order to continue cohabitation with her. The interstate transportation was thus a means of effecting sexual immorality, and hence a crime under the Act.

Similarly, in No. 30, the plural wife, Miss Ford, was undoubtedly motivated by a desire to return from Idaho to her home in Utah (*supra*, pp. 11–12). But her purpose in undertaking the interstate journey is immaterial. *Hart* v. *United States*, 11 F. 2d 499 (C. C. A. 9), certiorari denied, 273 U. S. 694; *Mallory* v. *United States*, 126 F. 2d 192 (C. C. A. 9); *Qualls* v. *United States*, decided July 5, 1945 (C. C. A. 5). The material fact is petitioner Petty's purpose in transporting her to her home. His action in proposing sexual relations immediately upon their arrival in Utah, and his subsequent abandonment of Miss Ford after she refused to cohabit with

him, justify the conclusion that he transported her from Idaho to Utah primarily because he expected to engage in sexual relations with her as a result of the transportation; that he would not have brought her to her living quarters had he known of her intention not to cohabit with him. He was thus motivated by an immoral purpose within the purview of the Mann Act.

Thus, in each case, the immoral purpose was not merely incidental to, but was the dominant motive of, the interstate transportation of the woman named in the indictment and the transportation facilitated the accomplishment of that purpose. It is unimportant that the immoral relationship may have been established prior to the interstate journey. If the operator of a house of prostitution who decided to move his establishment from one state to another transported the girls employed by him, it surely could not be contended that, because the girls had previously been prostitutes, the transportation was not for the purpose of prostitution. So here, the fact that, in most instances, petitioners had previously had sexual relations with their plural wives does not preclude a finding that the purpose to have sexual relations was the motive for the particular interstate transportation charged in the indictment. Since, as we have shown, it was in fact the dominant motive, the principle of the *Mortensen* case is inapplicable.

## II

### THE EVIDENCE IN CASES 31–33 ESTABLISHES A VIOLATION OF THE FEDERAL KIDNAPING ACT

The Federal Kidnaping Act punishes the transportation in interstate commerce of "any person who shall have been unlawfully * * * inveigled, decoyed * * * and held for ransom or reward or otherwise." We submit that the stipulated facts establish that the child named as the victim was both "unlawfully inveigled and decoyed" and "held for ransom or reward or otherwise."

These cases do not present merely the situation of an elopement with a minor. Petitioners induced a child 15 years old, with the mental age of 7 years, whom they knew to be a ward of the court, to remain in their custody rather than in the custody of her parents and the court. In view of the child's tender years and extremely low mentality, there was ample warrant for the trial judge to conclude that the girl was incapable of understanding the full significance of petitioners' importunities. Their inducement thus falls within the dictionary definition of "inveigle," as "to lead on or astray by blinding," or "to entice by cajoling." Webster's *International Dictionary*. See also *In re Kelly*, 46 Fed. 653, 655 (D. Ore.); *Gould* v. *State*, 71 Neb. 651, 656 (1904); *Arrington* v. *State*, 3 Ga. App. 30 (1907); *State* v. *Rivers*, 84 Vt. 154, 157 (1911).

It is also clear that the child was held for the purpose of enabling petitioner Chatwin to cohabit with her. This was a holding for "ransom or reward or otherwise" within the meaning of the statute. In *Gooch* v. *United States*, 297 U. S. 124, 128, this Court decided that the words "or otherwise" were not limited to pecuniary profits but extended to a holding for any purpose that might secure some benefit to the transgressor. See also *United States* v. *Parker*, 103 F. 2d 857, 861 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Miller* v. *United States*, 138 F. 2d 258 (C. C. A. 8), certiorari denied, 320 U. S. 803. The Kidnaping Act has been applied to a situation where the purpose of the holding was sexual intercourse. *Poindexter* v. *United States*, 139 F. 2d 158 (C. C. A. 8).[7]

[7] As we pointed out in our brief in opposition (Nos. 895-905, October Term 1944, p. 11), the indictment in this case failed to specify the purpose of the holding. In their motion to quash, petitioners attacked the indictment generally as failing to state an offense (R. 84), but did not attack its sufficiency as a pleading in the district court, in the circuit court of appeals, or in the petition for a writ of certiorari. They now, for the first time, raise the point that the indictment was insufficient for failure to allege the purpose of the holding (Br. 55-56). From their stipulation of facts it is evident that petitioners were aware of the charge against them, and, as we have shown, the facts stipulated establish an offense under the statute. Under such circumstances, the indictment, if defective, was, we submit, cured by the verdict. See *Knight* v. *United States*, 137 F. 2d 940 (C. C. A. 8), where a kidnaping indictment in substantially the same form was upheld against a motion to vacate the judgment of conviction. See also *Knight* v. *Hudspeth*, 112 F. 2d 137, 139

That Chatwin ultimately married the child in Mexico does not, we think, absolve petitioners from liability under the Kidnaping Act. The child had been withheld from her parents and from the Utah juvenile authorities for almost two months before the trip to Mexico and back to Arizona was undertaken, and presumably had been cohabiting with Chatwin during that period. The kidnaping, i. e., the inveigling and holding for ransom, reward, or otherwise had, therefore, already taken place before the start of the interstate journey, and the transportation of the child so kidnaped was an offense under federal law as soon as state lines were crossed. As in the Mann Act cases, *supra*, petitioners' professed religious beliefs do not absolve them from liability for their deliberate acts in violation of a federal statute.[8]

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(C. C. A. 10), certiorari denied, 311 U. S. 681; cf. *Hagner* v. *United States*, 285 U. S. 427, 433.

[8] Each of the petitioners moved to quash the indictment returned against him and submitted an affidavit in which he alleged on information and belief that the prosecution was instigated by the leaders of the dominant Mormon Church, who were opposed to petitioners' sect, that the foreman of the grand jury was not qualified to sit because he was a member of the high priesthood of the church, and that most, if not all, of the members of the grand jury were influential members of the Mormon Church. The only specific fact set forth in each such affidavit was a declaration of the General Conference of the Mormon Church in 1931, thirteen years before the return of the indictment, that the leaders of the church were willing to give "such legal assistance as we legitimately can" in the criminal prosecution of persons who live in plural marriage (R. 2–6, 57–63, 73, 84, 99, 110). The district court in its opinion stated that the motions to quash

## CONCLUSION

The judgments below should be affirmed.

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had been overruled on the ground that "there was no evidence or proof before the Court that there was any bias or prejudice or irregularities in the action of the Grand Jury upon which the Court could presume to act in the premises, other than an allegation that the foreman of said jury was a member of a different sect of which the defendants were alleged to be adherent, which was considered insufficient to sustain the motion in the absence of any affirmative showing that the foreman of the grand jury personally entertained views antagonistic to the defendants or, even if he did, that there was no showing as to any bias or prejudice on the part of any of the other members of the grand jury returning said indictments." (R. 14.) The circuit court of appeals held that petitioners' "motions and *ex parte* affidavits, alone and without more, were not enough to warrant the quashing" of the indictments (R. 119). The decisions below on this point, which petitioners challenge (Br. 28–30), are clearly correct. It is well established that the burden of proving discrimination or prejudice is on the challenger (*Akins* v. *State of Texas*, No. 853, October Term 1944, decided June 4, 1945), and that "it is incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough." *Glasser* v. *United States*, 315 U. S. 60, 87, and cases cited. The record is barren of any evidence presented or offered by petitioners to support their vague charges made on information and belief.